O. 190. 14.

Motion Papers for D. E.

Filed Sept. 13, 1897.

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JAMES H. MCKENNEY,
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IN SUPREME COURT OF THE UNITED STATES.

October Term, 1897.

No. 190.

THE GREEN BAY AND MISSISSIPPI CANAL COMPANY, PLAINTIFF IN ERROR,

vs.

THE PATTEN PAPER COMPANY (Limited), THE UNION PULP COMPANY AND THE FOX RIVER PULP AND PAPER COMPANY, KAUKAUNA WATER POWER COMPANY, HENRY HEWITT, Jr., W. P. HEWITT, ET AL., DEFENDANTS IN ERROR.

MOTION TO DISMISS OR AFFIRM.

JOHN T. FISH,
ALFRED L. CARY,
DAVID S. ORDWAY,
MOSES HOOPER,
Attorneys for Defendants in Error.

[illegible]

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MOTION TO DISMISS.

Now come the defendants in error, Kaukauna Water Power Company, Henry Hewitt, Jr., William P. Hewitt, The Patten Paper Company (Limited), The Union Pulp Company, and the Fox River Pulp and Paper Company, and move the court to dismiss the writ of error in the above entitled action because it appears upon the record returned with the writ of error; that

1. There is no federal question arising on the record filed in this court.

2. There was not drawn in question in this action in the state courts the validity of any treaty, or statute of, or authority exercised under the United States, nor was there any decision in this action in the state courts against the validity of any treaty, or statute of, or authority exercised under the the United States.

3. There was not drawn in question in this action in said state courts the validity of any statute of, or authority exercised under any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States,

wherein the decision was in favor of the validity of such statute of, or authority exercised under such state.

4. No title, right, privilege or immunity claimed under the constitution of the United States, or any treaty, or statute of, or commission held, or authority exercised under, the United States, was specifically set up or claimed in the trial court or Supreme Court of the State of Wisconsin by the plaintiff in error, nor was there any decision in either of said state courts against any such title, right, privilege or immunity specially set up or claimed by the plaintiff in error.

5. The judgment from which the writ of error is taken goes upon two grounds, to-wit: 1st. That the act of the State of Wisconsin, entitled "An Act to provide for the improvement of the Fox and Wisconsin rivers and connecting the same by a canal," approved August 8th, 1848, did not give to the plaintiff in error, and that it never acquired under or pursuant to the provisions of said act, any right to the use for hydraulic purposes of any of the water of Fox river below or down stream from the government dam, or to divert the water of the said river away from the lands of the defendants in error, and that the plaintiff in error never acquired any such right by condemnation proceedings or otherwise under said act. And, 2nd. That the plaintiff in error never acquired, by purchase, limitation or otherwise, any right to divert the water of Fox river from the natural channels thereof, or from the lands of the defendants in error (except for the purposes of navigation), below or down stream from the government dam, so-called, and mentioned in the record in this case.

6. This case involves a statute of the State of Wisconsin, the construction of which by the highest court of the state in which a decision could be had adverse to the plaintiff in error will be respected and followed by this court.

7. The highest court of the State of Wisconsin in which a decision in this action could be had, in construing a statute of said state, to-wit: "An Act to provide for the improvement of the Fox and Wisconsin rivers, and connecting the same by a canal," approved August 8th, 1848, decided *against* the contention of the plaintiff in error, which contention was that said act of the state gave to the plaintiff in error the use of all the water of the Fox river except such as might be necessary for the purposes of navigation, below or down stream from the government dam.

8. The highest court of the State of Wisconsin in which a decision in this action could be had has ruled, in and by its judgment in this action, that the plaintiff in error had no right or authority, at the common law, to divert the waters of Fox river from the natural channels thereof below the government dam and away from the lands of the said defendants in error,

except for navigation purposes, which ruling went upon ground *non* federal, and which ground alone is sufficient to sustain the judgment from which the writ of error is taken.

9. If there is a federal question to be found or involved in the judgment of the state court from which this writ of error is taken, still such judgment went upon two grounds, the one federal, the other *non* federal and broad enough in itself to support the judgment from which the writ of error is taken, without reference to the federal question.

10. These defendants in error also, under Rule 6, hereby unite with the motion to dismiss a motion to affirm the judgment from which this writ of error is taken, on the ground that, although the record may show that this court has jurisdiction, it is manifest that the writ of error is taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument.

JOHN T. FISH,
ALFRED L. CARY,
Attorneys for defendant in error, Kaukauna Water Power Company, *et al.*

DAVID S. ORDWAY,
Attorney for defendants in error, Henry Hewitt, Jr., and William P. Hewitt, and of counsel for said Water Power Company.

MOSES HOOPER,
Attorney for said defendants in error, Patten Paper Company, (Limited), Union Pulp Company and Fox River Pulp and Paper Company.

IN SUPREME COURT OF THE UNITED STATES.

THE GREEN BAY & MISSISSIPPI CANAL COMPANY, *Plaintiff in Error,*

vs.

THE PATTEN PAPER COMPANY, (LIMITED), THE UNION PULP COMPANY AND THE FOX RIVER PULP AND PAPER COMPANY, ET AL., *Defendants in Error.*

October Term, 1897.

No. 190.

Notice of motion to dismiss, etc.

To BREESE J. STEVENS AND
EPHRAIM MARINER,
Attorneys for Plaintiff in Error.

GENTLEMEN:

Please take notice that on Monday, the 4th day of October, A. D. 1897, at the opening of court on that day, we shall upon the record in this cause submit to the Supreme Court of the United States, at its court room in Washington, D. C., a motion to dismiss the writ of error in the above entitled action, for the reasons and upon the grounds in said motion stated; and will also unite with said motion to dismiss, a motion to affirm, pursuant to the provision of subdivision five (5) of Rule six (6) of the Supreme Court of the United States; and that at the same time and place we shall submit to the said Supreme Court in support of such motions, printed arguments with copies of which together with a copy of such motion you are herewith served.

Dated September 4, A. D. 1897.

Yours, etc.,

JOHN T. FISH,
ALFRED L. CARY,

Attorneys for said defendant in error, Kaukauna Water Power Company, *et al.*

DAVID S. ORDWAY,

Of counsel for said Water Power Company and attorney for defendants in error, Henry Hewitt, Jr., and William P. Hewitt.

MOSES HOOPER,

Attorney for said defendants in error, Patten Paper Company (Limited), Union Pulp Company and Fox River Pulp and Paper Company.